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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

**No. 76-339**

GEORGE CALVIN COUSINS,

*Petitioner,*

v.

STATE OF MARYLAND,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF THE STATE OF MARYLAND

**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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**PRELIMINARY COMMENTS**

This Brief in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

**OPINIONS BELOW**

Petitioner, George Calvin Cousins, was indicted by the grand jury of Montgomery County on January 29, 1975, (Criminal No. 15714) which charged him with larceny, shoplifting and receiving stolen property of the value of \$100.00 (One Hundred Dollars) or more;

larceny, shoplifting and receiving stolen property under the value of \$100.00 (One Hundred Dollars), assault upon Marilyn Neal, a security guard, and carrying a deadly weapon openly with intent to injure.

On February 13, 1975, Appellant was tried in the District Court of Maryland for Montgomery County by the Honorable Calvin R. Sanders, on a charge of assault upon Ronald Wood. The District Court case grew out of the same incident for which Appellant was indicted in the Circuit Court in Criminal No. 15714, but involved a different victim. After hearing the testimony of Miss Neal and Mr. Wood, the District Court found Cousins not guilty of assaulting Wood. The Court stated that while the evidence was sufficient to establish an assault by Cousins upon Marilyn Neal, it was not sufficient to establish an intent on the part of Cousins to assault Ronald Wood.

Thereafter, Cousins filed in the Circuit Court for Montgomery County a Motion to Dismiss the Indictment on the grounds of collateral estoppel and double jeopardy. A hearing on the Motion was held on June 16, 1975 (Shearin, J.). The trial court denied the motion on that same date and Appellant immediately noted an appeal to the Court of Special Appeals of Maryland. The Court of Appeals of Maryland granted a writ of certiorari on its own Motion on December 10, 1975, prior to a decision by the Court of Special Appeals. On April 8, 1976, the Court of Appeals of Maryland filed a reported opinion in which it affirmed the order of the lower court denying the Motion to Dismiss the indictment. *Cousins v. State*, 277 Md. 383, 354 A.2d 825 (1976). From that decision of the Court of Appeals of Maryland the Petitioner has applied to this Honorable Court for a writ of certiorari to review the decision of the Court of Appeals of Maryland.

## JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of Title 28 of the United States Code, Section 1257(2)(3).

## QUESTION PRESENTED

Whether the Trial Court properly denied the Motion to Dismiss Counts One through Eight of the Indictment herein on the grounds that the Appellant was twice placed in jeopardy?

## STATUTES INVOLVED

Petitioner contends that the Fifth Amendment to the United States Constitution is involved.

## STATEMENT OF THE CASE

As is set out in "Opinions" below, *supra*, on January 29, 1975, Petitioner was indicted in the Circuit Court of Montgomery County on charges of larceny, shoplifting and receiving stolen property of the value of \$100.00 or more, larceny, shoplifting and receiving property under the value of \$100.00, assault upon Marilyn Neal, a security guard; and carrying a deadly weapon openly with intent to injure. Prior thereto, on February 13, 1975, Appellant was tried in the District Court of Maryland for Montgomery County on the charge of assault upon Ronald Wood and was acquitted of that charge by the Court. As a result of that acquittal, Petitioner thereafter filed a Motion to Dismiss the Indictment in the Circuit Court of Montgomery, on grounds of collateral estoppel and double jeopardy. The trial court denied the Motion. Thereafter, Petitioner noted an appeal and the Court of Appeals filed a reported opinion affirming the order of the trial court denying the motion to dismiss the indictment.

Marilyn Neal and Ronald Wood were employed as store detectives by the Hecht Company at Montgomery Mall Shopping Center on December 27, 1974. They were in the men's clothing department when they noticed George Calvin Cousins and Ina Brown touching several articles of clothing but not really appearing to be interested in the clothes. The two detectives continued to watch Mr. Cousins and Mrs. Brown for a few minutes until the pair left that department. Being suspicious, they asked a salesperson to alert them should Mr. Cousins and Mrs. Brown return to the men's department.

Approximately fifty minutes later the two detectives were informed that Cousins and Brown had returned to the men's department. From a vantage point in an adjacent department, Miss Neal and Mr. Wood watched as Mrs. Brown removed leather coats from a display rack and handed them to Mr. Cousins. He placed them in a fabric suit bag. In all, seven leather coats were taken.

Cousins and Brown then proceeded to leave the store, walking down a main aisle past a cash register and through a doorway to an enclosed shopping mall. Mr. Cousins was carrying the suit bag which, because of its weight, he dragged along the floor.

Miss Neal and Mr. Wood followed the pair out of the store, exiting by an adjacent door. Once outside the store and in the public mall, Miss Neal confronted Mr. Cousins, identifying herself as a store detective. She told Cousins that he was under arrest for shoplifting and requested that he return the merchandise. Cousins at first asked what merchandise, but when Miss Neal repeated her demand, Cousins said, "These are my leathers." He pointed a knife directly at her. At this time Miss Neal was about two or three feet from

Cousins, with Wood to her side and slightly behind her. Upon seeing the knife, she leaned back and motioned Wood to do likewise.

Mr. Cousins and Mrs. Brown continued to walk out of the mall, as Cousins dragged the suit bag with one hand and carried the knife with the other. Neal and Wood followed. When they reached a set of glass doors of a walkway leading to the mall parking lot, Mrs. Brown held the doors open for Mr. Cousins. At this point, Cousins handed the knife to Brown. Mrs. Brown waved the knife at Neal and Wood to keep them away as she and Cousins proceeded to their car on the parking lot. Upon reaching the car, the two got in and sped away. Mr. Wood noted the license plate number of their car. Approximately two minutes elapsed from the time all of the coats were placed in the bag to the time the pair drove away.

Miss Neal and Wood immediately reported the incident to the police. They swore out a warrant for both George Cousins and Ina Brown on December 27, 1974. The warrant pertaining to Cousins charged shoplifting and an assault upon both Neal and Wood. Cousins and Brown were arrested in the District of Columbia on the same night.

## ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS COUNTS 1 THROUGH 8 OF THE INDICTMENT HEREIN ON THE GROUNDS THAT THE APPELLANT WAS TWICE PLACED IN JEOPARDY.

The Fifth Amendment of the United States Constitution which provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb is part of the common law of Maryland, *Thomas v. State*, 277 Md. 257, 353 A.2d 240 (1976). Former

jeopardy is a bar only when the offense for which the defendant was formerly placed in jeopardy is the same offense as that for which he is presently prosecuted. The double jeopardy clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). The Maryland Court has made it clear that the purpose of the double jeopardy prohibition, common law or constitutional, is to forbid a second trial for the same offense. *Brown v. State*, 2 Md. App. 388 (1967).

The Petitioner argues that the entire indictment should have been dismissed because the double jeopardy principle prohibits successive trial for offenses which arise from the same criminal transaction and that only one criminal transaction was involved here.

The Respondent submits that even assuming *arguendo* that the offense of assault upon Ronald Wood for which Petitioner was tried and acquitted in the District Court of Maryland was part of the same transaction as it related to the offenses charged in the indictment in the Circuit Court for Montgomery County, this fact would not bar a trial in the Circuit Court on grounds of double jeopardy. As will be shown *infra*, the test for determining whether a charge in one trial is the "same offense" for which an accused has stood trial in another case is whether the same evidence is required to sustain the charges and not whether the two offenses arose out of the same criminal transaction.

In *Morgan v. Devine*, 237 U.S. 632, 641, 35 S. Ct. 712, 59 L. Ed. 1153 (1915), this Court rejected the contention that the identity of offenses for double jeopardy purposes is based upon the similarity of the criminal act or occurrence, stating (237 U.S. at 641):

"... this Court has settled that the tests of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes."

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the jury returned guilty verdicts against the Defendant under two counts of a five count indictment charging Defendant with violations of the Harrison Narcotic Act. The Defendant contended that the two sales of drugs having been made to the same purchaser and following each other with no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold, constituted a single continuing offense. Justice Sutherland speaking on behalf of the Court stated (52 S. Ct. at 182);

"Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Gavieres v. United States*, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433; 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' Compare *Albrecht v. United States*, 273 U.S. 1, 11, 12, 47 S. Ct. 250, 71 L. Ed. 505, and cases there cited. Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed."

In *Ciucci v. State of Illinois*, 356 U.S. 571, 78 S. Ct. 839, 2 L. Ed. 2d 983 (1958), the defendant was alleged to have murdered his wife and three children. He was tried and convicted in separate trials of the murder of his wife and one of the children. The Court found no violation of due process in bringing the defendant to trial for the murder of a second child. The Court recognized that the State was constitutionally entitled to prosecute these individual offenses singly at separate trials and to utilize therein all relevant evidence, in the absence of proof establishing that such a course of action entailed fundamental unfairness.

In *Gavieres v. United States*, 220 U.S. 338, 31 S. Ct. 421, 55 L. Ed. 489 (1911), the defendant was convicted under a local ordinance (Manila, Phillipines) for behaving in a drunken boistrous, rude and indecent manner in a public place. Thereafter Defendant was charged and also convicted of insulting a public official under the penal code of the Phillipine Islands. This Court found that the acts and words of the accused set forth in both charges were the same but in the second case the additional, essential element necessary for conviction was that the misbehavior in deed and words was addressed to a public official. This Court held (31 S. Ct. at 423):

"it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment. In the second case it was necessary to aver and prove the insult to a public official or agent of the authorities, in his presence or in a writing addressed to him. Without such charge and proof there could have been no conviction in the second case. The requirement of insult to a public official was lacking in the first offense. Upon the charge, under the ordinance, it was necessary to show that the

offense was committed in a public place, open to public view; the insult to a public official need only be in his presence or addressed to him in writing. Each offense required proof of a fact which the other did not. Consequently a conviction of one would not bar a prosecution for the other."

See also *Carter v. McClaughry*, 183 U.S. 365, 33 S. Ct. 181, 46 L. Ed. 236 (1902). *Burton v. United States*, 202 U.S. 344, 26 S. Ct. 688, 50 L. Ed. 1057 (1906).

In applying the facts of the case at bar to the law of double jeopardy as set forth above, the Court of Appeals of Maryland (Eldridge, J.) stated, 354 A.2d at 834:

"Applying the required evidence test, we find that Cousins would not be placed in jeopardy twice by a trial on the indictment before us. Those counts of the indictment charging larceny, shoplifting, and receiving stolen property all obviously require different evidence and have different elements than the previous charge of assault. The count charging violation of Maryland Code (1957, 1971 Repl. Vol.), Art. 27, Section 36, carrying a weapon openly with intent to injure, requires proof that the defendant carried a weapon openly, an element not found in the offense of assault. Assault requires proof of an attempt to injure another by force, an element not found in the Art. 27, Section 36, offense. *Yantz v. Warden*, 210 Md. 343, 351, 123 A.2d 601, cert. den. 352 U.S. 932, 77 S. Ct. 236, 1 L. Ed. 167 (1956). Thus, the offenses are not the same for double jeopardy purposes under the required evidence test. And a prior acquittal for an assault upon one person does not bar a subsequent prosecution for assault upon another even though both offenses may have occurred at the same time, as both are separate offenses."

The required evidence test has also been applied in a number of Maryland cases. See *Novak v. State*, 139 Md. 538, 115 A. 853 (1921); *Rouse v. State*, 202 Md. 481, 97 A.2d 285 cert. den. 346 U.S. 865, 74 S. Ct. 104, 98 L. Ed.

376 (1953); *State v. Coblenz*, 169 Md. 159, 180 A. 266 (1935).

The Petitioner urges that this Honorable Court adopt the "same transaction" rule proposed by Justice Brennan in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Respondent submits that the facts of the instant case as previously shown, clearly indicate that the double jeopardy claim under the "same evidence" test is without merit. On that basis alone the Petition should be denied.

In apparent recognition of this fact the Petitioner has filed his Petition to this Honorable Court urging this Honorable Court to overrule the long established precedent of the Supreme Court decisions applying the "same evidence" test and adopt the "same transaction" test under the double jeopardy clause. Respondent in this regard submits that for two reasons the present case would not be the proper vehicle for such a reevaluation by this Honorable Court. First, this case does not remotely suggest harassment of the petitioner so as to rise to error of a constitutional level. As noted by Judge Eldridge in *Cousins v. State*, *supra*:

"The prosecution in the district court for assault on Ronald Wood was based upon a warrant. The remaining charges are all contained in a single indictment. There is no evidence that the separate prosecutions were for the purpose of harassing or 'wearing down' Cousins, or in expectation of procuring a harsher penalty, evils which the double jeopardy clause was intended to prevent."

Secondly, the facts of the case at bar do not focus a sharp distinction between the "same evidence" and "same transaction" tests. While it is abundantly clear that application of the "same evidence" test results in a determination that double jeopardy does not apply, it is

equally true that if the "same transaction" rule were adopted and applied, the result would be the same. As the record reflects, Cousins and his companion were inside the store for a period of time shoplifting a number of articles. Then they left the store and as they were in the public mall they were approached by the store detectives at which point the assaults occurred. Hence, it is quite conceivable that the counts of the indictment relating to the offenses occurring in the store could be considered separate and apart from the offenses relating to the events occurring outside the store. Thus, the assault charged in the District Court indictment might well be viewed as not being part of the same transaction relating to the offenses charged in the circuit court indictment. Therefore respondent submits that the factual posture of this case is simply not conducive to the adoption of the same transaction rule proposed by the Petitioner and a rejection of the required evidence rule.

Hence, since this Honorable Court has in numerous cases adopted and applied the required or same evidence test to define "same offense" under the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and since Maryland has applied that test to the instant case no substantial federal question has been presented. The Petitioner has failed to show a conflict between existing Maryland law and existing constitutional law as enunciated by this Honorable Court. Therefore, the questions raised by Petitioner are not properly reviewable by way of certiorari to the Supreme Court of the United States. Supreme Court Rule 19.

**CONCLUSION**

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari to the Circuit Court of Montgomery County should be denied.

Respectfully submitted,

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